No. 83-504

In the Supreme Court of the United States

OCTOBER TERM, 1983

FIELD CONTAINER CORPORATION, PETITIONER

v.

INTERSTATE COMMERCE COMMISSION AND UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether the Interstate Commerce Commission abused its discretion in determining, for purposes of computing demurrage charges, that certain rail cars had been "constructively placed" at petitioner's facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-11a) is reported at 712 F.2d 250. The opinion of the Interstate Commerce Commission (Pet. App. 12a-15a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on June 28, 1983. The petition for a writ of certiorari was filed on September 23, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Railroads assess demurrage charges against receiving shippers with respect to cars that those shippers do not unload within a specified period of "free time." Under the tariffs applicable in this case, the charges were $10 per car

for each of the first four days beyond the initial free time, $20 for each of the next two days, and $30 for each subsequent day (Pet. 3). These demurrage charges have a double purpose: " 'One is to secure compensation for the use of the car and of the track which it occupies. The other is to promote car efficiency by providing a deterrent against undue detention.' " *ICC* v. *Oregon Pacific Industries, Inc.*, 420 U.S. 184, 189-190 (1975) (quoting *Turner Lumber Co.* v. *Chicago, M. & St. P. Ry.*, 271 U.S. 259, 262 (1926)).

The tariff of respondent Chicago and North Western Transportation Company (C&NW) contains two alternative methods for computing demurrage charges: the "straight demurrage" and the "average agreement" methods. Under the straight demurrage method, the shipper is assessed demurrage charges, at the rate set forth in the tariff, on each car that is held beyond the free time for loading and unloading. Under the average agreement method, the shipper may offset (at a rate of $10 per day) demurrage charges on those cars that are held beyond the period of free time with "credits" earned on other cars that were released within the first 24 hours of free time (Pet. App. 7a).

2. Petitioner, a manufacturer of paperboard containers, uses the average agreement demurrage system. This case involves shipments of rolls of pulpboard and fiberboard that petitioner received at its Elk Grove Village, Illinois, facility during the first three months of 1979. Extremely bad weather resulted in delays in unloading the shipments at petitioner's facility, for which C&NW assessed demurrage charges against petitioner in the amount of $18,870 (Pet. App. 2a, 13a). Petitioner refused to pay the charges and instead filed a complaint with the Interstate Commerce Commission, alleging that the charges violated the Interstate Commerce Act, 49 U.S.C. (Supp. V) 10701, 10741, and 10761. Specifically, petitioner complained that the cars had not been delivered to its facility on the dates from which

the charges were assessed. Petitioner claimed that the detention period should be calculated only from the time the cars were actually delivered, rather than from the dates C&NW asserted they had been "constructively placed" for petitioner.[1] Alternatively, petitioner argued that it should be relieved from payment of the penalty portion of the demurrage.

The administrative law judge determined that petitioner had failed to meet its burden of proof (*i.e.*, to show that C&NW was at fault in failing to place the cars), and ordered the complaint dismissed. A three-member Review Board reversed the initial decision, concluding that "actual placement" governed the accrual of demurrage.

The Commission reversed the Review Board (Pet. App. 12a-15a), finding that the parties' practice of notification and constructive placement was determinative and governed the accrual of demurrage charges. Petitioner was ordered to pay the full demurrage (*id.* at 15a).

3. The court of appeals affirmed the Commission's decision in all respects (Pet. App. 1a-11a). The court found that petitioner's choice of the average agreement method was a reasonable contractual means of allocating the risks inherent in the delivery of rail shipments (*id.* at 7a-8a). The court rejected petitioner's contention that C&NW had not "placed" the cars on which demurrage was assessed, and could not have done so, because of the weather conditions (*id.* at 8a-10a). The court explained (*id.* at 8a-9a) that, under the existing business practice between the parties, C&NW

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[1]Constructive placement is defined by the applicable tariff as those instances "[w]hen a car consigned or ordered to a private track * * * cannot be actually placed because of a condition attributable to the consignor or consignee * * *." Item 545 of the National Demurrage Tariff, Tariff ICC H-74 (G.S. Trzaska, Agent). See also *Union Gas & Electric Co.* v. *Chesapeake & O. Ry.*, 176 I.C.C. 194, 197-198 (1931) (defining constructive placement).

was not required to deliver the cars to petitioner's siding until petitioner telephoned C&NW requesting delivery. Because petitioner failed in this case to fulfill its obligation of requesting delivery, the cars were considered to have been constructively placed and petitioner was barred from claiming otherwise (*id.* at 9a-10a). Finally, the court rejected petitioner's argument that the bad winter weather was a *force majeure* that excused it from the demurrage on the cars (*id.* at 10a-11a). In so doing, the court noted that "[t]he whole purpose of the average agreement is to shift the risk of unexpectedly bad weather to the shipper" (*id.* at 11a).

ARGUMENT

The decision of the court of appeals, upholding the Commission's reasonable interpretation of the instant tariff, is correct, turns largely on the peculiar facts of this case, and does not, in any event, involve a question of general importance warranting this Court's review.

Petitioner argues that there could be no finding of constructive placement here because the cars were not delivered solely due to the severe weather conditions, which were not "a condition attributable to the consignor or consignee" within the meaning of the applicable tariff (see note 1, *supra*). But as both the court of appeals (Pet. App. 9a-10a) and the Commission (*id.* at 14a-15a) concluded, the cars were considered under constructive placement because of the failure of petitioner, the consignor, to call C&NW to request the cars after it received notice of their arrival.[2]

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[2]This determination did not in any way modify the tariff agreement between the parties. Rather, as the court of appeals noted (Pet. App. 10a), it was a reasonable application of the agreement in effect between petitioner and C&NW.

This determination was reasonable in the circumstances of this case. It was the undisputed, longstanding practice of the parties that, once the cars had arrived at C&NW's yard and C&NW had notified petitioner of their arrival, petitioner would be charged with the cars but would not receive them until it called and requested them (Pet. App. 9a). On the days in question, petitioner made no calls to request the cars. This unannounced departure from petitioner's established practice (*i.e.*, petitioner's failure to call for the delivery of cars when it allegedly was prepared to unload them) was the critical, determinative fact in this case.

In *Bowman Transportation, Inc.* v. *Arkansas-Best Freight System, Inc.*, 419 U.S. 281, 285 (1974), this Court observed that the scope of review under the "arbitrary and capricious" standard is a narrow one. The court of appeals in this case properly applied that standard in upholding, as reasonable, the Commission's interpretation of the tariff and agreement (Pet. App. 9a-10a). Surely, it was neither arbitrary nor an abuse of discretion for the Commission, in determining whether constructive placement of rail cars had occurred, to take account of the usual business practice of the parties in arranging for the delivery of such cars. In so doing, the Commission was simply interpreting the existing average agreement tariff in light of the particular circumstances present here. Petitioner voluntarily entered into the average agreement (Pet. App. 7a), and it was not unreasonable for the Commission, based on the instant facts, to hold petitioner accountable for its actions.

CONCLUSION

The petition for a writ a certiorari should be denied.

Respectfully submitted.

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